

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ARTHUR PHILLIPS

v. : Civil Action No. DKC 14-0980

DR. COLIN OTTEY, et al.

MEMORANDUM OPINION AND ORDER

Defendants filed a partial motion to dismiss or for summary judgment, arguing solely that, as non-governmental actors, they are not subject to the First Amendment and thus Plaintiff's § 1983 retaliation claim fails.¹ Generally, of course, a prison contractor can be liable under 42 U.S.C. § 1983, as acting under color of state law. *West v. Adkins*, 487 U.S. 42, 54 (1988). Defendants cite no authority for treating First Amendment claims differently than Eighth Amendment claims. Similar claims have been discussed without any such distinction. See, e.g., *Burton v. Lynch*, 664 F.Supp.2d 349, 366-68 (S.D.N.Y. 2009), *Randle v. Alexander*, 960 F.Supp.2d 457, 482 (S.D.N.Y. 2013). Accordingly, their argument to the contrary fails. In a reply memorandum, some of the Defendants (all except Mr. Flury) argue that *respondeat superior* cannot provide a basis for liability. They

¹ The same analysis would apply to the parallel argument under Article 19 of the Maryland Declaration of Rights. On the other hand, Plaintiff concedes that his claim under Article 10 should be dismissed.

may well be correct, but the court declines to address an issue raised for the first time in a reply memorandum.

Accordingly, it is this 4th day of January, 2016, by the United States District Court for the District of Maryland ORDERED that:

1. Plaintiff's claim brought under Article 10 of the Maryland Declaration of Rights BE, and the same hereby IS DISMISSED;

2. Defendants' partial motion to dismiss Plaintiff's amended complaint, or, in the alternative, partial motion for summary judgment BE, and the same hereby IS, DENIED; and

3. The clerk will transmit copies of this Memorandum Opinion and Order to counsel for the parties.

/s/
DEBORAH K. CHASANOW
United States District Judge